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No. 92-1950

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOEL PROYECT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress intend that the mandatory minimum sentence be applied to a marijuana grower on the basis of plants that the defendant was not growing for distribution but instead intended to discard pursuant to standard practice?

2. In light of the legislative history that the mandatory sentences were intended to apply to major drug traffickers, did Congress intend the mandatory sentencing provision to apply to a person who grew marijuana for his own use rather than for distribution of substantial quantities of marijuana?

3. Is there a rational basis for triggering the mandatory minimum statute by counting male marijuana plants that are not intended to be harvested for

distribution but instead are discarded by growers?

4. Is there a rational basis for applying the mandatory sentencing provision to a person who grew marijuana for personal use?

5. Is there a rational basis for a conclusive statutory determination that a person who grows 100 marijuana plants is a major drug dealer?

LIST OF PARTIES

In addition to petitioner Joel Proyect, the only other party to the appeal before the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, was the United States of America as appellee.

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOEL PROYECT,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Petitioner Joel Proyect respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the

Second Circuit, entered on March 15, 1993, which affirmed the judgment of conviction of petitioner previously entered in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction of petitioner is reported as United States v. Proyect, 989 F.2d 84 (2d Cir. 1993). The opinion is set forth in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction was rendered on March 15, 1993. A petition for rehearing with a suggestion for rehearing en banc was denied on May 10, 1993. The jurisdiction of this Court to

review the judgment by writ of certiorari is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall...be deprived of life, liberty, or property, without due process of law.

Title 21, United States Code, Section 841(a),(b)(1)(B)(vii) provides:

> **§841. Prohibited acts A**
>
> **Unlawful acts**
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or posses with intent to distribute or dispense, a counterfeit substance.
>
> **Penalties**
>
> (b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection(a) of

this section shall be sentenced as follows:

(1) ...

(B) In the case of a violation of subsection (a) of this section involving -

...

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight;

...

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years....

STATEMENT OF THE CASE

This is a case in which the draconian sanction of a five-year mandatory minimum sentence literally applicable to 100 or more marijuana plants has been imposed on a lawyer for growing 110 plants, half of which would have been discarded prior to harvest pursuant to the standard practice of growers. This harsh mandatory sentence

was imposed on an individual who concededly is not a drug lord, but instead is an acknowledged heavy user who grew marijuana for personal use by himself and his fiancee. Far from being a drug trafficker, petitioner Joel Proyect ("Proyect") was a dedicated and highly regarded lawyer in upstate New York, who regularly took on cases not for profit but for the public good and who earned the respect of his peers and members of his community.

After waiving indictment in the United States District Court for the Southern District of New York, Proyect was charged in an information with violating 21 U.S.C. §§841(a)(1) and 841(b)(1)(B) by "manufacturing" (i.e., growing) marijuana on his property in upstate New York.

Jurisdiction was invoked under 18 U.S.C. §3231.

Proyect pled guilty to the charge of growing marijuana, but raised various issues relating to sentencing. Finding that there were 110 marijuana plants growing on Proyect's property, the district court imposed the mandatory minimum sentence of five years with great reluctance and only because it felt that it was bound by the literal language of the mandatory minimum sentencing statute, which uses the mechanistic approach of simply counting whether there were 100 or more marijuana plants. Indeed, the district court took the unusual step of stating affirmatively that it hoped that the imposition of the mandatory sentence would be reversed on appeal. The sentence

was affirmed by the Second Circuit Court of Appeals.

However, as we show below, imposition of the mandatory minimum was neither correct nor unavoidable under the circumstances of this case. Based on the expert testimony presented to the district court, it made a finding that half of the 110 plants were male plants. As the Second Circuit noted in its decision, "the experts agreed that it is standard practice for growers to discard the male plants in order to avoid pollinating the female plants, which reduces their yield as well as their quality." Appendix, at A-7, 8.[1] Thus, in order to reach the 100

---

[1] One of the experts stated that "[i]t is generally accepted that it is the female plants that are cultivated for production of usable material. Male plants are generally useless and are discarded" (emphasis added). Second Circuit Appendix, at A. 36. Another

plant threshold that triggers the mandatory minimum sentence, it was necessary to count the 55 male plants that would have been discarded long before harvest as soon as they matured enough to show their sex.

Moreover, the legislative history clearly reflects that Congress intended that the mandatory minimum sentence be applied to major drug traffickers -- a profile that clearly does not fit

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expert explained the reasons why it is the "standard practice for growers to discard male plants as they indicate sex" (emphasis added), and why "male plants are not used by regular marijuana users or in the commercial trade": (1) the "failure to remove male plants could result in contamination and lower yields of useable material in the female plants", which, if they are pollinated, concentrate more on producing seeds (which are not desirable) rather than buds; and (2) "male plants have little usable THC, the psychoactive chemical found in marijuana", particularly in the female buds. Second Circuit Appendix, at A. 123, 130.

petitioner. To the contrary, Proyect was dedicated to his profession as an attorney and is held in high regard in the community for his character, integrity, and decency.[2] Proyect admittedly grew marijuana for heavy personal use. There was no evidence that he engaged in commercial sales of marijuana. There was no finding that he was ever a drug trafficker. There was no finding that he intended to distribute any marijuana, let alone a quantity substantial enough to render him a major drug trafficker.

Under these circumstances this appeal presents important issues concerning whether as a matter of statutory construction -- or due process of law --

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[2] Numerous letters from attorneys, clients and others in the community attesting to these circumstances were submitted to the district court.

the mandatory minimum sentence can be triggered on the basis of marijuana plants that were not intended to be harvested for distribution, and indeed on the basis of plants that under the undisputed expert testimony would have been discarded long before harvest. This is the unusual case where the harsh literal statutory interpretation urged by the government would contravene legislative intent and would render the statute arbitrary and irrational. As shown infra, by adopting this literal interpretation, the Second Circuit Court of Appeals has failed to follow the teaching of this Court in Chapman v. United States, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) concerning Congress' market-oriented approach, and has interpreted the drug enhanced sentencing statute in a manner that

conflicts with the approach of other circuit courts of appeals in construing this Court's decision in Chapman.

Moreover, neither the government nor the courts below were able to articulate a rational basis for applying the mandatory minimum statute to marijuana plants that are discarded by growers and not intended for distribution. The irrationality of the situation here is further exacerbated by the requirement of the mandatory minimum sentencing scheme that each marijuana plant be treated as being equivalent to a yield of one kilogram of marijuana. According to the experts, the ratio of one kilogram to one plant is completely belied by results obtained under normal growing conditions. Indeed, the sentencing guidelines recognize that the average yield of a mature marijuana plant is only

one-tenth of a kilogram. Furthermore, the arbitrariness is compounded by the fact that the statute creates a conclusive or irrebuttable presumption that a grower of 100 plants is a major drug dealer. As we show infra, this Court has held that an irrebuttable presumption violates the due process clause where -- as here -- it is neither necessarily nor universally true.

In sum, Proyect was sentenced to a mandatory minimum sentence of five years for growing 55 male and 55 female plants.[3]

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[3] Proyect has suffered severe collateral consequences as well. Due to the strict forfeiture laws which require forfeiture of all thirty acres of his property even though the marijuana was grown only on a tiny portion, Proyect must forfeit all of the property where he has lived for sixteen years, including the home he built by himself over a period of nine years out of wood and stones from the property. At best, he would only be allowed to buy back his home and land by paying the Government its present fair market value --if he can borrow enough money. See United States v. All Right,

That unduly harsh sentence, which Congress intended to be given only to major drug traffickers, was imposed on petitioner despite the circumstances that: (1) he would have discarded the 55 male plants once their sex showed; (2) he did not intend to distribute the yield from the 55 female plants; and (3) there was no finding that he was ever a drug trafficker, let alone the major drug dealer targeted by Congress. We respectfully submit that further review by this Court is eminently warranted in order to address and remedy this travesty of justice.

Title and Interest in a 30 Acre Parcel of Land, More or Less, and Appurtenances thereto, known as Breezy Hill Road, 91 Civ. 5375 (GLG). Moreover, based on the conviction and mandatory minimum sentence of five years, and after the affirmance of the five-year sentence on appeal, Proyect was suspended from the practice of law for a period of five years.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT COURT OF APPEALS HAS INTERPRETED THE MANDATORY MINIMUM SENTENCING STATUTE IN A MANNER THAT CONTRAVENES THE TEACHING OF THIS COURT IN CHAPMAN AND THAT CONFLICTS WITH THE APPROACH OF OTHER CIRCUIT COURTS OF APPEALS IN CONSTRUING THIS COURT'S DECISION IN CHAPMAN.

This petition for a writ of certiorari presents the significant question of whether as a matter of statutory construction -- or due process of law -- the mandatory minimum sentence literally applicable to 100 or more marijuana plants can be triggered on the basis of marijuana plants that were not intended to be harvested for distribution and indeed on the basis of plants that would have been discarded long before harvest.

It is true that in the usual or ordinary case, when the language of the

statute is clear, its plain meaning controls its construction. However, as this Court has recognized, a statute's "plain meaning" is not an absolute command to be blindly followed in every case. Where, as here, the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters, the statute must be construed so as to give effect to legislative intent. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

It is clear that the purpose in enacting the mandatory minimum sentences in 21 U.S.C. §841(b) was to deter and punish major drug traffickers. As stated by Senator Byrd:

> We divide these major drug dealers into two groups for

> purposes of fixing what their required jail terms shall be:
>
> For the kingpins -- the masterminds ... the minimum term is 10 years .... Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail -- a minimum of 5 years for the first offense...

132 Cong. Rec. S14270, 14301 (daily ed. Sept. 30, 1986).

Thus, the literal statutory interpretation advocated by the government herein makes the mandatory sentencing provision rest on the arbitrary and irrational basis that punishment intended for major drug dealers can be triggered on the basis of plants that are not intended to be harvested for distribution, but instead are discarded by growers long before harvest pursuant to standard

practice (the 55 male plants) or grown for personal use (the 55 female plants). Not only is that literal interpretation at odds with Congressional intent, but no other court has ever applied a mandatory minimum sentence to such a situation. There can be no question that Proyect does not bear any resemblance to the type of major offender targeted by Congress in enacting this harsh statute.

Accordingly, the mandatory minimum statute should be construed so as to give effect to the clear congressional purpose. Here, the way to effect the legislative purpose is to construe the term "marijuana plants" in the mandatory minimum sentencing statute as meaning plants that were intended to be harvested for marijuana to be brought into the chain of distribution.

That interpretation is supported by the teaching of this Court in Chapman v. United States, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). In Chapman, this Court found that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed...is used to determine the length of the sentence" (emphasis added), and that this principle involving a market-oriented approach was implemented by Congress in the mandatory minimum sentences. Id., 114 L. Ed.2d at 535. This Court concluded that the drug enhanced penalty scheme "is intended to punish severely large-volume drug traffickers at any level" (emphasis added). Id., at 538.

It is clear, then, that in setting mandatory sentences Congress was concerned

with major drug traffickers, not persons who grow marijuana for personal use. Congress was concerned with the quantity of drugs on the market or that was intended to be brought into the chain of distribution, not with marijuana that was not intended for distribution.

Other courts of appeals have followed this market-oriented approach of Chapman in interpreting the drug enhanced penalty provisions of 21 U.S.C. §841(b), which increase the penalty beyond that otherwise called for by the weight of a drug by counting the entire weight of a "mixture" containing a detectable amount of the drug.[4] These courts have held that the

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[4] For example, 21 U.S.C. §841(b)(1)(B)(vii) provides a mandatory minimum sentence of 5 years for violations involving "100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marijuana plants regardless of

term "mixture" does not include a drug mixture that would not be brought into the chain of distribution. United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992) (holding that the weight of boric acid in a cocaine mixture should be excluded where it was not intended to be used as a cutting agent in a mixture that would have reached the distribution market); United States v. Robins, 967 F.2d 1387, 1390 (9th Cir. 1992)(holding that with respect to a mixture of cornmeal and cocaine, the weight of the cornmeal should be excluded because in actuality the cornmeal would be separated from the cocaine before the drug would be distributed and thus the mixture "did not constitute 'a drug product moving through the chain of distribution in the manner envisioned by Congress'" (citation

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weight."

omitted)); United States v. Bristol, 964 F.2d 1088 (11th Cir. 1992) (holding that with respect to a mixture of cocaine dissolved in wine, the weight of the wine should be excluded); United States v. Jennings, 945 F.2d 129, 136-37 (6th Cir. 1991) (rejecting literal interpretation of drug sentencing statute as applied to charges stemming from illegal manufacture of methamphetamine and ruling that sentencing could not be based on the weight of a mixture containing methamphetamine and manufacturing by-products not intended for ingestion because that would produce an illogical result and be contrary to the legislative intent underlying the statute); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991)(holding that with respect to a mixture of cocaine base, cutting

agent, and liquid waste, the mixture was not a "mixture" within the meaning of 21 U.S.C. §841(b) because it was not readily usable for distribution and thus the weight of the liquid waste should have been excluded).

Simply put, under Congress' market-oriented approach, the term "mixture" in the drug enhanced penalty statute means mixtures that are brought or intended to be brought into the chain of distribution. The same principle applies here, where the penalty otherwise called for by the quantity of marijuana is enhanced by treating 100 or more plants as if they each yielded ten times the average yield of a mature plant. In light of Congress' market-oriented approach aimed at major drug traffickers, it is improper to include the 55 male plants that would be

discarded, as well as the 55 female plants that were grown for personal use (and thus their yield was not intended to be brought into the chain of distribution). Simply put, as with the term "mixture", the term "marijuana plant" in the mandatory minimum sentencing statute means a plant that is intended to be harvested for marijuana that will be brought into the chain of distribution.

In its decision below the panel of the Second Circuit adopted a literal interpretation of the mandatory sentencing statute that "a plant is a plant is a plant." Appendix, at A-9. Its decision stands in conflict with the above-mentioned decisions of other courts of appeals, which rejected a literal interpretation that "a mixture is a mixture is a mixture" and construed the

drug enhanced penalty statute in light of Chapman's conclusion that Congress adopted a market-oriented approach aimed at major drug traffickers.[5] Certiorari should be

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[5] The circuits are sharply divided on this issue. See Sewell v. United States, 122 L.Ed.2d 745 (1993)(dissenting from denial of certiorari). However, another panel of the Second Circuit had rejected a harsh literal interpretation of the drug sentencing statute and concluded that the term "mixture" did not encompass a drug mixture that would not be brought into the chain of distribution. United States v. Acosta, 963 F.2d 551 (2d Cir. 1992). Despite Proyect's heavy reliance on Acosta and the other circuit court decisions that have adopted this market-oriented approach, the Second Circuit panel in the case at bar never addressed these arguments. The panel neither followed nor distinguished Acosta; it simply ignored Acosta.

Instead the panel ruled in the abstract that the literal language of the statute does not permit distinctions for marijuana plant gender, but said nothing to address or resolve the matter of distinctions based on whether the plants were intended to be discarded, or distinctions based on whether the plants were not intended to be harvested for distribution, in light of Congressional intent concerning mandatory minimum

sentences. The panel cited cases from other circuits rejecting a gender distinction, but, as Proyect had pointed out in his reply brief below, none of those cases involved a situation where as here it was necessary to count male plants that would be discarded in order to reach the 100 plant threshold that triggers the mandatory minimum sentence.

The panel also avoided addressing Proyect's personal use argument. It did so by ruling that the "personal use" argument was raised for the first time on appeal, despite the fact that neither the government in its brief nor the government or the panel at oral argument raised this point. The panel was clearly mistaken. Based on Acosta, Proyect had argued to the district court that the mandatory sentencing statute was inapplicable to him for two reasons:

> Thus, even though male plants may fall within the dictionary definition of plants, it would contravene legislative intent to base sentencing on items that concededly would never reach and are not intended to be part of the chain of distribution. Indeed, while female plants are used by some growers for harvesting marijuana for distribution, in the case at bar there is no evidence that even the female plants were intended to be harvested for

granted here to resolve this conflict and to address the significant issue as to whether the mandatory minimum sentencing statute can be triggered on the basis of marijuana plants that were not intended to be harvested for distribution.

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distribution. [Emphasis supplied.]

Sentencing letter dated May 21, 1992, at p. 3. Moreover, Proyect had raised the argument that it would contravene legislative intent to apply the mandatory sentencing statute to himself because, as a grower for heavy personal use, he did not bear any resemblance to the type of offender targeted by Congress. See, e.g., transcript of sentencing argument on May 18, 1992, at pp. 35, 42-43; sentencing memorandum, at pp. 1, 14-15. At the sentencing argument Proyect's counsel argued that there was "no evidence whatsoever here of any commercial sales", that Proyect grew for his "acknowledged heavy personal use", that the expert Rosenthal's opinion as to the potential yield was "clearly consistent with the heavy personal use of Mr. Proyect," and thus Proyect should not be punished as a drug trafficker, let alone the major drug trafficker whom the mandatory minimum sentence was aimed at. Transcript of May 18, 1992, at pp. 42-43.

II

IF INTERPRETED LITERALLY THE MANDATORY SENTENCING SCHEME IS UNCONSTITUTIONAL AS APPLIED TO THE CIRCUMSTANCES OF THIS CASE

As this Court noted in Chapman v. United States, supra, 114 L.Ed.2d at 538, a sentencing statute cannot pass constitutional muster if it is based on arbitrary distinctions that have no rational basis. If read literally, the mandatory sentencing scheme regarding marijuana offenses is arbitrary and irrational in several significant respects.

First, as already noted, the government's literal interpretation would make the statute rest on the arbitrary and irrational presumption that punishment intended for major drug traffickers can be based on plants that were not intended to be harvested for distribution, and indeed

on plants that would have been discarded long before harvest as soon as their sex showed. Neither the government, nor the district court, nor the Second Circuit panel has been able to articulate a rational basis for applying the mandatory minimum statute to plants that are discarded by growers or are not intended for distribution.

Second, the statutory penalty scheme and the sentencing guidelines based thereon raise serious issues concerning the arbitrary and irrational equivalency standard on which the mandatory minimum is based and which they require the courts to follow: namely, that one marijuana plant be treated as equal to one kilogram of marijuana whenever a defendant is sentenced for 50 or more plants. Under the sentencing guidelines, where the

defendant is being sentenced for less than 50 plants, the equivalent weight used to gauge the applicable offense level is 100 grams. See U.S.S.G. §2D1.1 (Background) ("The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marijuana plant equals 100 grams of marijuana."). However, where, as here, the defendant is sentenced for more than 50 plants, the equivalent weight skyrockets to ten times that amount: one kilogram. U.S.S.G. §2D1.1 (Background).

This equivalency scheme is derived from the statutory penalty provisions of 21 U.S.C. §841(b). In cases involving fewer than 50 plants, the statute is silent as to the equivalency. However, under both the statute and the guidelines, in any case involving 50 or more plants

the statute mandates a sentence based on the arbitrary equivalency of one kilogram per plant.

Congress has given no indication whatsoever as to the basis, if any, for a determination that a marijuana plant should be treated as equivalent to one kilogram -- ten times the average yield of a mature marijuana plant -- whenever 50 or more plants are involved.[6] Clearly the

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[6] When Congress first passed a mandatory minimum sentencing statute applicable to marijuana offenses in 1986, the five-year mandatory minimum sentence applied to marijuana offenses involving 100 or more kilograms of marijuana. As noted earlier, the statute was aimed at major drug dealers and would not have applied to this case. The statute was amended in 1988 to apply as well to offenses involving 100 or more marijuana plants. However, the stated purpose of the amendment was to avoid the debate over what parts of a plant should be included in determining the weight of marijuana where the marijuana is in the form of growing plants rather than harvested marijuana. 134 Cong. Rec. S17360, 17368 (daily ed. Nov. 10, 1988).

potential yield does not provide a rational basis for the equivalency. See United States v. Murphy, 786 F.Supp. 1105 (D.Conn. 1992), rev'd, 979 F.2d 287 (2d Cir. 1992). The appellate courts that have upheld the facial validity of this scheme have relied instead on Congress' desire to punish large-scale growers involved in large-scale drug trafficking. See, e.g., United States v. Murphy, supra, 979 F.2d 287.

Even assuming, however, that it is rational for Congress to give a marijuana plant that is being grown for harvest and subsequent distribution of marijuana an exponential effect 10 times the average yield of a mature plant, it would defy logic (and be irrational) to give such an exponential effect to an immature male plant that will be pulled from the garden

and discarded long before it would otherwise reach maturity and be harvested. Similarly, it would defy logic to give such an exponential effect to a female plant that is being grown for personal use. Yet that is how the statute was applied here.

Thus, the issue here is not whether Congress' goal of severely punishing major drug dealers -- whether at the manufacturing, importation, wholesale or retail level in the chain of distribution -- is a rational one. Nor is the issue whether there is a rational basis for Congress' decision to punish growers in the chain of distribution by the number of plants rather than the weight of the plants. The issue is whether there is a rational basis for the statutory means employed to accomplish this goal -- which

here involves simply counting whether there are 100 marijuana plants.

There is no indication whatsoever as to the Congressional basis, if any, for a determination that the growing of 100 plants provides a reasonable measure for concluding that the grower is a major drug dealer. The arbitrariness of the measure is only compounded by the fact that the statute makes a conclusive determination -- in effect an irrebuttable presumption -- that a person who grows 100 plants is a major drug dealer (and hence a five-year mandatory minimum sentence is warranted). No rational basis has been or could be suggested for such an irrebuttable presumption. The arbitrariness of the measure is further compounded by the factors previously noted. If Congress had bothered to conduct any study before

fixing the number of plants that would invoke a mandatory minimum sentence, it would have learned that a person who grows 100 plants will discard the 50 male plants once the sex traits show and will in fact only grow the 50 female plants for harvesting of usable marijuana.[7]

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[7] It is a cardinal principle that where an interpretation is urged that could render a statute unconstitutional, a court will first ascertain whether a construction of the statute is fairly possible which avoids the issue. Crowell v. Benson, 285 U.S. 22, 62 (1932). In Chapman, this Court noted that this canon of construction was useful in close cases, or cases where an interpretation raises grave doubts about the statute's constitutionality. Similarly, in Chapman this Court recognized that another canon of construction, the rule of lenity, comes into play where a literal interpretation produces a result so absurd or glaringly unjust as to raise a reasonable doubt that Congress intended the statute to be so applied. Chapman v. United States, supra, 114 L.Ed. 2d at 537, 538. Given the serious issues of arbitrariness and irrationality discussed in the text, these canons of construction suggest that the literal interpretation adopted by the courts below should be rejected so as to

Statutes creating irrebuttable presumptions have long been disfavored under the due process clause. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) (mandatory employment termination provisions violate due process clause where they amount to a conclusive presumption of physical incapacity of a teacher after the fourth or fifth month of pregnancy, when presumption was neither necessarily nor universally true); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) (statute that makes an entire household ineligible for food stamps where a member of it was claimed as a dependent by taxpayers ineligible for food stamps violates due process because

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avoid the grave doubts as to constitutionality and glaringly unjust result otherwise produced under the circumstances of this case.

it rests on a conclusive presumption that the tax dependent's household is not needy); Vlandis v. Kline, 412 U.S. 441 (1973) (statute creating an irrebuttable presumption of nonresidence based on student's legal address at time of application to college violates due process).

Moreover, where, as here, the conclusive or irrebuttable presumption embodied in the statute is not "necessarily" correct nor is it "universally true", then it flatly violates the Due Process Clause. Cleveland Board of Education v. La Fleur, supra, 414 U.S. at 646.

In the statute here at issue, Congress wanted to punish major drug dealers by subjecting them to mandatory minimum sentences. It created a

conclusive or irrebuttable presumption that a person who grows 100 marijuana plants is a major drug dealer. However, since such a presumption is clearly not necessarily correct nor universally true, it fails to pass muster under the due process clause. Indeed, 100 plants is not a rational measure for determining that a grower is a major drug dealer even if Congress had made the presumption a rebuttable one, which it did not.[8] See Leary v. United States, 395 U.S. 6 (1969)

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[8] Congress did not even bother to require that a grower be found to have an intent to distribute 100 plants before imposition of a mandatory minimum sentence. Congress has not deemed it impractical or impossible to require that specific intent to distribute be proved when the crime is possession. See 21 U.S.C. §§841 and 844. A conclusive or irrebuttable presumption that a person is a major drug dealer regardless of whether he had any intent to distribute and even if he grew for his own use is manifestly irrational.

(rebuttable presumption in marijuana statute unconstitutional where it cannot be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend).

If mandatory minimum sentences are to have any role in our criminal justice system, it is imperative that Congress make a careful determination as to the factors that warrant such a sentence and that there be a rational basis for that determination. Congress did not do that here. Nor have the courts below been able to articulate a rational basis for the mandatory minimum sentence under the particular circumstances of this case.

Certiorari should be granted to review the significant questions relating to the arbitrary and irrational mandatory

sentence imposed here. We respectfully submit that before this dedicated, highly regarded lawyer and admitted heavy user of marijuana is sent to jail for the mandatory term of 5 years intended only for major drug traffickers, this case should be given further review and -- absent an articulation of a rational basis for such treatment in this case, of which there is none -- the mandatory sentence vacated.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: June 7, 1993

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 472—August Term 1991

Argued: November 19, 1992 Decided: March 15, 1993

Docket No. 92-1347

UNITED STATES OF AMERICA,

Appellee,

—against—

JOEL PROYECT,

Defendant-Appellant.

Before:

PRATT and ALTIMARI, *Circuit Judges*, and
Gerald W. HEANEY, *Circuit Judge* of
the Eighth Circuit, sitting by designation.

Appeal from a judgment of conviction and sentence following a plea of guilty in the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge*. Defendant was convicted of manufacturing

in excess of 100 marijuana plants in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B). He challenges here the district court's application of the five-year mandatory minimum sentence to his case, 21 U.S.C. § 841(b)(1)(B)(vii), as well as the sentencing provision contained in section 2D1.1 of the sentencing guidelines.

Affirmed.

RONALD E. DEPETRIS, New York, NY (Carro, Spanbock, Kaster & Cuiffo, New York, NY, of Counsel), *for Defendant-Appellant.*

DAVID L. WALES, Assistant United States Attorney, New York, NY (Otto G. Obermaier, United States Attorney, Paul G. Gardephe, Assistant United States Attorney, New York, NY, of Counsel), *for Appellee.*

Anthony J. Colleluori and John J. Marshall, Jr. (Liotti & Skelos, Garden City, NY, of Counsel), *for Amici Curiae National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers.*

PRATT, *Circuit Judge*:

Proyect appeals his sentence following his plea of guilty to knowingly and intentionally manufacturing in excess of 100 marijuana plants in violation of 21 U.S.C.

§ 841(a)(1). Proyect was sentenced in the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge*, to five years' imprisonment, a four-year term of supervised release, and a $50 mandatory special assessment. *See* 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B).

BACKGROUND

A six-month federal drug enforcement investigation of Proyect and the thirty-acre property upon which he resides in upstate New York provided sufficient information for the government to believe that a greenhouse and two fenced-in areas on his land contained live marijuana plants. The simultaneous execution of an arrest and search warrant at his home in August of 1991 interrupted Proyect's ambitious horticultural activities; the government seized and destroyed a number of live and recently harvested marijuana plants found on his property.

While the precise number of marijuana plants attributable to Proyect was disputed at sentencing, the district judge found that Proyect manufactured at least 110 plants, and he declined to make further findings concerning other plants, because doing so would not have affected Proyect's sentence. This finding required the district judge to sentence Proyect to the statutory minimum of five years, although he did so with apparent reluctance.

On appeal, Proyect raises issues which we discuss below concerning (1) the constitutionality of the mandatory minimum provision, 21 U.S.C. § 841(b)(1)(B), and the applicable sentencing guidelines provision, § 2D1.1; (2) whether congress intended the mandatory minimum provision to apply to defendants who have manufactured

marijuana for their personal use; and (3) whether male marijuana plants, which contain diminished levels of the psychogenic chemical THC, must be excluded from sentencing calculations, based upon Proyect's reading of the statutory purpose or as compelled by constitutional concerns.

DISCUSSION

A. *Personal Use.*

Proyect and amici (referred to simply as "Proyect") raise an interesting argument for the first time on appeal, questioning congressional intent to apply the mandatory minimum sentence statute, 21 U.S.C. § 841(b), to defendants who do not distribute marijuana, but who grow it only for themselves.

Proyect concedes that the language of the statute contains no personal-use exception. 21 U.S.C. § 841(b) provides that

> any person who violates subsection (a) of this section [making it unlawful to knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance], shall be sentenced as follows
>
> (1)(B) In the case of a violation of subsection (a) of this section involving—
>
> (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight
>
> * * *

> such person shall be sentenced to a term of imprisonment which may not be less than 5 years
>
> * * * .

Id.

Proyect argues on appeal that the statutory language imposing such a severe penalty must be construed in light of its legislative history, which establishes that the drafters targeted the mandatory minimum sentence to ensnare middle-level drug dealers—those who, because of the large quantities of marijuana which they may introduce into the market, pose greater risks to society.

We may not address this contention, however, as it was not adequately developed in the district court. As we held in *United States v. Madkour*,

> sentencing disputes under the guidelines may be appealed * * * as long as the defendant 'first present[s] * * * [his argument] to the district court for determination.' *United States v. Irabor*, 894 F.2d 554, 555 (2d Cir. 1990). The same rule applies to claims of improper application of mandatory minimum sentences, for such sentences are applied under, not outside of, the sentencing guidelines.

930 F.2d 234, 236 (2d Cir.), *cert. denied*, 112 S. Ct. 308 (1991). *See also United States v. Papadakis*, 802 F.2d 618, 621 (2d Cir. 1986) (double jeopardy claim on appeal waived as not raised in trial court), *cert. denied*, 479 U.S. 1092 (1987).

At sentencing Proyect's counsel argued that Proyect was not the "major, serious drug trafficker" that congress aimed to penalize with the mandatory minimum statute; however, all of his arguments on this point were in con-

nection with his contentions about the gender of marijuana plants, discussed below. References to Proyect's largely personal use of the seized marijuana were offered to justify a downward departure from the sentencing guidelines range in the event that the district judge held the mandatory minimum sentence inapplicable. Since these statements did not put the issue clearly before the district court, we do not consider the issue as properly before us.

B. *Drug Quantity Standards Under Statute and Guidelines.*

Proyect argues that the equation of 100 live marijuana plants with 100 kilos of harvested marijuana, found in both the guidelines and the statute, is undercut by scientific evidence that suggests that one live plant cannot consistently produce one kilogram of the harvested substance. Accordingly, he contends, that equation is arbitrary and irrational, and therefore unconstitutional

We rejected this contention in *United States v. Murphy*, 979 F.2d 287 (2d Cir. 1992), where we held that congress had a rational basis for its choice of penalties; congress could have "reasonably concluded that individuals who grew 100 or more plants were as culpable as individuals found guilty of offenses involving 100 or more kilograms of marijuana." *Id.* at 290.

We further held in *Murphy* that § 2D1.1 of the sentencing guidelines is constitutional as its "one-kilo-one-plant" formula for offenses involving in excess of 50 marijuana plants is consistent with congressional intent as expressed in § 841(b)(1)(B)(vii). U.S.S.G. § 2D1.1, comment. ("In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana

plants, treat each plant as equivalent to 1 KG of marihuana * * * ."); *Murphy*, 979 F.2d at 290-91 (citing *United States v. Osburn*, 955 F.2d 1500, 1506 (11th Cir.), *cert. denied*, 113 S. Ct. 223 (1992); *United States v. Motz*, 936 F.2d 1021, 1025 (9th Cir. 1991)). Since this panel is bound by the *Murphy* opinion, we need devote no further attention to this argument.

C. *Marijuana Plant Gender.*

Proyect's final contention is that we must interpret 21 U.S.C. § 841(b)(1)(B)(vii) and § 2D1.1 of the sentencing guidelines to exclude male marijuana plants from the calculations in order for those provisions to be constitutional. He maintains that the government should exclude one-half of the marijuana plants seized on his property as representing the typical yield of commercially useless male plants that contain substantially lower quantities of the psychoactive chemical THC. If the male plants in this case were excluded, then the mandatory minimum sentence would not apply, because the district court found that Proyect manufactured only 55 female plants

At sentencing, both parties submitted affidavits by experts concerning the use of male plants in marijuana cultivation. Apparently, marijuana plants grow in stages after they germinate from seeds. During the initial vegetative growth stage, the plants do not show any sex differentiation. After the growth stage, the plants enter the flowering stage, when the plants indicate their sex. Because male marijuana plants produce a markedly lesser psychotropic effect than that obtained from smoking or ingesting the leaves or buds of female plants, they have less commercial value and are not generally marketed. Most importantly to Proyect's argument, the experts agreed that it is standard practice for growers to discard

the male plants in order to avoid pollinating the female plants, which reduces their yield as well as their quality. Male plants may, however, be mixed in with female plant material as filler, and they are necessary to produce marijuana seeds.

The district court rejected the statutory construction portion of this argument, saying at Proyect's sentencing,

> I am certainly persuaded that if Congress wanted to make a distinction between male and female plants, plants that produced relatively more or relatively less of a usable marijuana product, it could have done so.

We review *de novo* the district court's construction of § 841(b)(1)(B), as well as its decision to reject a challenge to the constitutionality of these provisions. *Murphy*, 979 F.2d at 289; *In re Bellamy*, 962 F.2d 176, 178 (2d Cir. 1992). The plain language of § 841(b) permits no distinctions for marijuana plant gender, and when the language of the statute is clear, its plain meaning ordinarily controls its construction. *See Lewis v. Grinker*, 965 F.2d 1206, 1221 (2d Cir. 1992). *See also Moskal v. United States*, 111 S. Ct. 461, 468-70 (1990); *United States v. Albertini*, 472 U.S. 675, 680 (1985) (courts applying criminal laws generally must follow plain and unambiguous meaning of statutory language). Congress's definition of marijuana is very expansive:

> [a]ll parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

21 U.S.C. § 802(16).

Our circuit has previously noted the extremely broad scope of the statutory definition: " 'Congress intended to prohibit possession of *all varieties* of marijuana.' " *Madkour*, 930 F.2d at 239 (quoting *United States v. Kinsey*, 505 F.2d 1354 (2d Cir. 1974)) (emphasis added).

Other circuits, rejecting arguments like that made by Proyect, have confirmed that "Congress intended to outlaw all plants popularly known as marijuana to the extent that those plants possess THC". *United States v. DeLeon*, 955 F.2d 1346, 1350 (9th Cir. 1992); *see also United States v. Honneus*, 508 F.2d 566, 574-75 (1st Cir. 1974) (congress meant to include any and all marijuana-producing Cannabis when specifying "Cannabis sativa L."), *cert. denied*, 421 U.S. 948 (1975); *United States v. Walton*, 514 F.2d 201, 202-03 (D.C. Cir. 1975); *United States v. Moore*, 446 F.2d 448, 450 (3d Cir. 1971), *cert. denied*, 406 U.S. 909 (1972).

The eighth circuit has also recently considered and rejected Proyect's gender-distinction argument. *United States v. Curtis*, 965 F.2d 610, 615-16 (8th Cir. 1992) (noting that guidelines do not distinguish between male and female plants). *See also United States v. Webb*, 945 F.2d 967, 968 (7th Cir. 1991) (rejecting as irrelevant defendant's argument that only female plants should be counted for sentencing purposes), *cert. denied*, 112 S. Ct. 1228 (1992).

We join our sister circuits that have held that congress did not intend courts to count only female marijuana plants when determining a defendant's responsibility for drug quantities under § 841(b)(1)(B)(vii). Essentially, congress requires courts to perform this task by applying the simple concept that "a plant is a plant is a plant." Thus, the statute is clear. As to the parallel provision in

the sentencing guidelines, we can read § 2D1.1 no differently, nor does Proyect present us with any reason to do so.

On the constitutional level, we affirm the district court's rejection of Proyect's contention that a gender distinction must be read into § 841(b)(1)(B)(vii) to negate concerns about its constitutionality. To sustain a federal sentencing statute against a due process or equal protection challenge, courts need only find that "Congress had a rational basis for its choice of penalties." *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991). *See also Madkour*, 930 F.2d at 239-40 (courts may not disregard clear congressional mandate requiring mandatory minimum sentence for 100 or more marijuana plants, however ill-advised they may think congress's exercise of authority to be); *United States v. Mendes*, 912 F.2d 434, 438-39 (10th Cir. 1990) (rejecting equal protection challenge to § 841(b), by determining statute was rationally related to a legitimate state interest); *United States v. Lee*, 957 F.2d 778, 784 (10th Cir.) (same), *cert. denied*, 113 S. Ct. 475 (1992).

The legislative history of § 841(b)(1)(B)(vii) makes clear that, in enacting a mandatory minimum sentence based solely upon the number of plants a grower possesses, Congress " 'intended to punish growers of marijuana by the scale or potential of their operation and not just by the weight of the plants seized at a given moment.' " *United States v. Eves*, 932 F.2d 856, 859 (10th Cir.) (quoting *United States v. Fitol*, 733 F. Supp. 1312, 1315 (D. Minn. 1990)), *cert. denied*, 112 S. Ct. 236 (1991). Congress thus sought to avoid creating disparities that would vary merely because of the age and size of particular plants when they were seized. *Webb*, 945 F.2d at 968.

We cannot say that there is no rational basis for congress's use of a graduated series of penalties for drug-trafficking offenses based either upon the quantity of harvested marijuana that defendants may introduce to the market, or the number of live plants that a defendant may grow with unknown production potential. We, therefore, affirm the district court's rejection of the constitutional challenge to the statute. And, as § 2D1.1 of the sentencing guidelines conforms to the language and legislative intent of 21 U.S.C. § 841, we also affirm the district court's rejection of defendant's challenge to the guidelines provision. *See, e.g., Murphy*, 979 F.2d at 290-91; *United States v. Watson*, 783 F. Supp. 39, 41-42 (D. Conn. 1992) (defining standard of constitutionality for guidelines).

Affirmed.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of May, on thousand nine hundred and ninety-three.

DOCKET NUMBER: **92-1347**

UNITED STATES OF AMERICA,

Appellee,

v.

JOEL PROYECT,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant Joel Proyect.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
s/ELAINE B. GOLDSMITH,
Clerk
S/by Carolyn Clark Campbell
Chief Deputy Clerk